IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: MANYINDO, D.C.J., PLATT, J.S.C., & SEATON, J.S.C. CIVIL

APPEAL NO. 18/91

BETWEEN

DEPARTED ASIANS PROPERTY

CUSTODIAN BOARD:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

ISA BUKENYA t/a NEW MARS WEAR HOUSE:::::::::::::::::::::::::: RESPONDENT

(Appeal from the Ruling and Order of the High Court of Uganda at Kampala (Mrs. Justice A.E.Mpagi Bahigeine) dated 10/4/91)

IN

HIGH COURT CIVIL SUIT NO. 518A/88

JUDGMENT OF PLATT, J.S.C.

The Appellant, the Departed Asians Property Custodian Board, td which I will refer as “the Board”, had been sued in the High Court by Isa Bukenya trading as New Mars Wear House. Mr. Bukenya sued to recover his property and general damages for trespass; lose of benefit of trading licence, and loss of business. Mr.Bukenya claimed that he was entitled to these reliefs because he had been the law ful occupant of a shop in William Street Kampala which has been allocated to him by the Board. On the other hand the Board denied that Mr. Bukenya was its lawful tenant, indeed Mr. Bukenya had not recognised the Board as hi landlord, and had not paid rent to the Board for premises. Consequently the Board denied that Mr. Bukenya was entitled to the property and also denied the various items and damages claimed. Judgment was given ex parte for a total sum of about Shs. 15,642,201/=.

The Board then sought to set aside the exparte judgment, and a motion on notice dated the 7th May 1991, supported by an affidavit together with a counter-affidavit, came on for hearing on the 5th June 1991. On the 26th September 1991, the learned Judge dismissed the application with costs. She observed that having considered the detailed arguments advanced by Mr. Byaburakirya with particular care she did not think it necessary to set down her reasons in detail, but she stated that she had addressed herself properly both as to the law and fact, and in her view there were no good or substantial reasons to justify setting aside the decree.

Against this ruling the Board appealed on two grounds.

1. The learned Judge erred in law to have dismissed the Appellant's application without giving detailed reasons for the dismissal.

2. The learned Judge erred in law to have failed to exercise her discretion and allow the Appellant's application when there were good grounds for doing so.

I must agree with Mr. Ssekandi for the appellate Board that it was improper for the learned Judge not to have given reasons for her ruling, because she had made a mistake. In the Judgment given ex parte she made this remark:-

> "The defendant filed a Written Statement of Defence denying liability but did not appear at the hearing which proceeded ex parte an affidavit of service having been duly filed."

It is generally conceded that it is not a case of an affidavit of service having been duly filed. The true position is, as the record shows, that the hearing date was taken by consent of both parties for the 23rd January 1991 at 9.00 a.m. This entry was signed by the Registrar on the 9th July 1990. It must be said on behalf of Mr. Tibaijuka, who appeared for Mr. Bukenya, that he

had on that date stated quite clearly:-

> "Today's date was fixed by consent. This is a long standing suit characterised by a series of adjournments at the instance of the defence. In the circumstances I pray that I be granted leave to proceed ex parte. Last time the said adjournment was granted by the court."

This had been pointed out t the learned Judge by Mrs. Byaburakirya, and so the position is that the learned Judge failed to approach the case on the correct basis, and we must with regret say that the ruling appealed from is defective for lack of reasoning. Then, if one, were to excuse the fact that no reasons were given, one cannot excuse the statement that when she gave her ex-parte judgment she stated the wrong reasons why she had proceeded exparte.

It can be argued however that on the 23rd January 1991 when the learned Judge allowed Mr. Tibaijuka to proceed ex parte, he had put the proper case to the Judge that the date had been fixed by consent. The normal inference would be that that would be the reason why the learned Judge allowed Mr. Tibaijuka to proceed ex parte. But if then in her Judgment the Learned Judge explained that the hearing had proceeded ex parte because an affidavit of service having been duly filed it is not clear whether the learned Judge had proceeded ex parte of a consent, or because of an affidavit of service. It is this discrepancy which ought to have been cleared up in the ruling which only goes to show the wisdom for the practice that reasons should be given for judgments or orders.

Passing then to the second ground of appeal I must observe what the learned Judge. was bound to do under Order 9 Rule 24 of the Civil Procedure rules:-

> "In any case in which s decree is passed ex parte against the defendant he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly, served or that he was prevented by any sufficient cause from appearing when the suit was ca1led on for hearings the Court shall make an order setting aside the decree as against him upon such terms as

to costs of payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also."

It follows that the Board had to satisfy the learned Judge either that the summons had not been duly served upon it, or that it was prevented by any sufficient cause from appearing when the suit was called on for hearing. Then if the court is satisfied, it may set aside the decree upon such terms as costs, payment into court, or otherwise as it thinks fit. In the present case the Board had to satisfy the Court that it had been prevented from appearing for a sufficient cause. Now if the date for the hearing had been taken by consent in July 1990 then prima facie there was no good reason why the Board did not appear.

The reason why the date taken by consent was said not to be final was that not all cases fixed by consent or confirmed for hearing are cause-listed, therefore the Appellant expected to have served upon him a hearing notice. As against that Mr. Tibaijuka argued that where a date has been fixed by consent of the parties there would be no hearing notice since there would he no need or it. Mr. Tibaijuka produced a copy of the form by which a consent date may be taken signed by both counsel (see Appendix A to Mr. Tibaijuka's affidavit sworn on 28th May, 1991). The arguments advanced concerning the call-over or change of date do not apply. Nothing of that sort appears to have happened. I have looked at the original record and dates had previously been taken by consent and acted upon. What seems to have happened is that Mr. Ssekandi unfortunately did not keep in mind, the hearing date 23rd January,1991 which by consent had been taken on the 9th July, 1990.

I then proceed to consider whether the forgetfulness of Mr. Ssekandi could be a sufficient cause preventing him from appearing. With great regret I am unable to find that it is. I recognise that it is very easy to make a mistake of this nature but the date was taken by consent and court had proceeded to judgment and given the Judgment on the basis of the plaintiff's evidence. There is no other cause which prevented the advocate from appearing

apart from the explanation given. That being so I cannot say that there was a sufficient cause.

The position then is that had the learned Judge properly addressed her mind to the issue presented to her he was hound to find that the date for the hearing had been taken by consent and the Registry would issue no further hearing notice unless the hearing date taken by consent was unacceptable to the Court. It was then for advocate to keep in touch with the Registry, follow the call-over of cases for hearing, and proceed according to the consent date. I am certain that the learned Judge would have come to the same conclusion that she did had she corrected her mistake in the ex-parte judgment and gone back to the correct state of affairs a presented to her on the 23rd January 1991.

I must now proceed to consider what the Supreme Court should do at this stage. It seems to me that the jurisdiction of this Court is to exercise e powers, authority, jurisdiction vested in the Court from which the appea1 is brought. (See Section 40 of the Judicature Act 1967). Hence exercising the power of the High Court to determine the matter under Order 9 Rule 24 of the Civil Procedure Rules I find that no sufficient cause was shown why the appellate Board did not appear on 23 January 1991, I conclude therefore that the learned Judge came to the right conclusion for the wrong reasons and I would substitute the right reasons. I would uphold her decision and I would dismiss the appeal with costs.

Dated at Mengo this 30th day of June 1992.
H.G. PLATT
JUSTICE OF THE SUPREME COURT

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JUDGMENT OF MANYINDO D.C.J.

I perused in draft the Judgment of Platt, J.S.C. just delivered. I agree with it and as Seaton, J.S.C. also agrees, the appeal, is dismissed with costs of the respondent.

Dated at Mengo this 30th day of June 1992

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

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JUDGMENT OF SEATON.J.S.C.

I have read in draft the Judgment of my learned brother, Platt J.SC.

I concur therewith and have nothing to add.

Dated at Mengo this 30th day of June 1992

E.E. SEATON
JUSTICE OF THE SUPREME COURT

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